

1
2
3
4
5
6
7 IN THE UNITED STATES DISTRICT COURT
8 FOR THE NORTHERN DISTRICT OF CALIFORNIA
9 SAN JOSE DIVISION

10 Gary Kremen,

NO. C 06-02554 JW

11 Plaintiff,

**ORDER GRANTING DEFENDANT'S
MOTION TO DISMISS WITH
PREJUDICE**

12 v.

13 American Registry For Internet Numbers, Ltd.,

14 Defendant.
_____ /

15 **I. INTRODUCTION**

16 Plaintiff Gary Kremen ("Plaintiff") brings this antitrust action alleging violations of the
17 Sherman and Cartwright Acts and the California Business and Professions Code. Before the Court
18 is Defendant American Registry for Internet Numbers, LTD's ("ARIN") Motion to Dismiss pursuant
19 to Federal Rule of Civil Procedure 12(b)(6). The Court conducted a hearing on October 23, 2006.
20 Based upon the papers submitted to date and the oral arguments of counsel, the Court grants
21 Defendant's Motion to Dismiss, because Plaintiff's claims are time-barred under applicable statutes
22 of limitations.

23 **II. BACKGROUND**

24 Plaintiff alleges the following:

25 On April 3, 2001, Plaintiff obtained a \$65 million Judgment from the Court against
26 defendants Stephen Michael Cohen ("Cohen") and related entities in the case of *Kremen v.*
27 *Cohen*, No. 98-20718 (JW). The Judgment imposed a constructive trust on defendants'
28 assets. (Complaint for Violation of Antitrust Laws; Conversion; Unfair Business

1 Competition; Breach of Fiduciary Duty ¶ 11, hereafter, "Compl.," Docket Item No. 1.) At
2 the time of the Judgment, Cohen owned blocks of IP Addresses and ASNs ("IP Resources")
3 that are in commercial use and are of economic value. The Judgment directed ARIN, as
4 custodian, to transfer the IP Resources to Kremen. (Compl. ¶ 12.) Citing its internal
5 policies, ARIN refused to transfer the IP Resources to Kremen. (Compl. ¶ 13.)

6 Since 2001, Kremen has been in the Internet advertising business, with a pay-per-
7 click search engine and over 5000 domain names. Kremen's business would have received
8 substantial benefit if Kremen had control of the IP Resources from the time of the Court's
9 September 2001 Order. (Compl. ¶ 14.) ARIN's refusal to comply with the Order has
10 deprived Kremen of the opportunity to pursue business strategies that would exploit the
11 value of the IP Resources and has enabled Cohen to derive unjust benefit from the IP
12 Resources to Kremen's detriment. (Compl. ¶¶ 15, 16.)

13 Plaintiff filed this action in April 2006, alleging eight causes of action: (1) Count 1, for
14 agreement in restraint of trade in violation of Section 1 of the Sherman Act; (2) Count 2, for
15 conspiracy to restrain trade in violation of Section 1 of the Sherman Act; (3) Count 3, for monopoly
16 in violation of Section 2 of the Sherman Act; (4) Count 4, for attempted monopoly in violation of
17 Section 2 of the Sherman Act; (5) Count 5, for conspiracy and acts in restraint of trade under the
18 Cartwright Act; (6) Count 6, for conversion; (7) Count 7, for breach of fiduciary duty; and (8) Count
19 8, for violation of California's Unfair Competition Law. Presently before the Court is ARIN's
20 Motion to Dismiss. ARIN contends, *inter alia*, that the claims are time-barred and insufficiently
21 pled. (Notice of Motion and Motion of American Registry of Internet Numbers, Ltd. to Dismiss
22 Plaintiff's Complaint Pursuant to Rule 12(b)(6) or Alternatively, for a Stay at 2, hereafter, "Motion,"
23 Docket Item No. 11.)

24 **III. STANDARDS**

25 A complaint may be dismissed for failure to state a claim upon which relief can be granted.
26 Fed. R. Civ. P. 12(b)(6). A claim may be dismissed as a matter of law for "(1) lack of a cognizable
27
28

legal theory or (2) insufficient facts under a cognizable legal theory." Robertson v. Dean Witter Reynolds Co., 749 F.2d 530, 534 (9th Cir. 1984). "A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957). The court "must presume all factual allegations of the complaint to be true and draw all reasonable inferences in favor of the non-moving party." Usher v. City of Los Angeles, 828 F.2d 556, 561 (9th Cir. 1987). In determining the propriety of a Fed. R. Civ. P. 12(b)(6) dismissal, a court may not look beyond the complaint. Schneider v. California Dept. of Corrections, 151 F.3d 1194, 1197 (9th Cir. 1998) ("The focus of any Rule 12(b)(6) dismissal . . . is the complaint.") A court may dismiss a case without leave to amend if the plaintiff is unable to cure the defect by amendment. Lopez v. Smith, 203 F.2d 1122, 1129 (9th Cir. 2000).

IV. DISCUSSION

The Supreme Court has previously applied federal antitrust laws to anticompetitive conduct of nonprofit organizations. Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Oklahoma, 468 U.S. 85, 100 (1984). The nonprofit character of an enterprise does not place it beyond the purview of federal laws regulating commerce. Camps Newfound/Owatonna v. Town of Harrison, 520 U.S. 564, 584 (1997).

A. Sherman Act Claims (Claims 1-4)

ARIN contends that the statute of limitations on Kremen's claims began to run by November 2001, when Kremen presented ARIN with the Court's September 2001 Order; consequently, Plaintiff's claims have been time-barred since November 2005. (Motion at 5-6.) Plaintiff contends his claim is timely pursuant to the continuing violation doctrine. (Plaintiff's Opposition to Motion of American Registry of Internet Numbers, Ltd. to Dismiss Plaintiff's Complaint Pursuant to Rule 12(b)(6), or, Alternatively, for a Stay at 2, hereafter, "Opposition," Docket Item No. 20.)

Sherman Act claims are undisputedly subject to a four year statute of limitations. 15 U.S.C. § 15b. The statute of limitations on an antitrust cause of action begins to run when a defendant

1 commits an act that injures a plaintiff's business. Zenith Radio Corp. v. Hazeltine Research, Inc.,
2 401 U.S. 321, 338 (1971). In a continuing violation circumstance, the plaintiff's interests are
3 repeatedly invaded, and each invasion results in accrual of a new cause of action. Hennegan v.
4 Pacifico Creative Service, Inc., 787 F.2d 1299, 1301 (9th Cir. 1986). When the plaintiff alleges a
5 continuing violation, an overt act by the defendant is required to restart the statute of limitations.
6 Pace Indus., Inc. v. Three Phoenix Co., 813 F.2d 234, 237 (9th Cir. 1987). An "overt act" (1) must
7 be a new and independent act that is not merely a reaffirmation of a previous act and (2) must inflict
8 new and accumulating injury on the plaintiff. Id. at 238.

9 Plaintiff has alleged that ARIN first became aware of the Court's September 2001 Order
10 when he presented the Order to ARIN in November 2001. (Compl. ¶ 49.) Plaintiff has further
11 alleged that "from the outset," ARIN's response was to "negotiate its own settled terms, rather than
12 comply with those of the Court's Order." (Compl. ¶ 50.) The statute of limitations for the injury
13 allegedly inflicted on Plaintiff by ARIN began to run in November 2001. Plaintiff's Complaint
14 presents no subsequent overt act by ARIN to restart the statute of limitations. ARIN's refusal on
15 multiple occasions to transfer the IP Resources constituted a mere restatement of its original
16 decision. The Court finds that the statute of limitations expired in November 2005. Since Plaintiff
17 did not file this suit until April 2006, his Sherman Act claims (Claims 1-4) are time-barred.

18 **B. Cartwright Act Claim (Claim 5)**

19 The Cartwright Act is patterned after the Sherman Act, and both acts codify the general
20 common law prohibition against restraints of trade. G.H.I.I. v. MTS, Inc., 147 Cal. App. 3d 256,
21 265 (1983), citing Corwin v. Los Angeles Newspaper Serv. Bureau, Inc., 4 Cal.3d 842, 852 (1971).
22 As such, decisions under the Sherman Act are applicable to the Cartwright Act. Id.

23 Plaintiff's Cartwright Act claim is also governed by a four-year statute of limitations, which
24 began to run when Defendant allegedly committed an act inflicting injury on the Plaintiff, in
25 November 2001. As discussed above, Plaintiff has not alleged a subsequent overt act by ARIN that
26
27
28

1 would restart the statute of limitations. Plaintiff's Cartwright Act claim (Claim 5) is also time-
2 barred.

3 **C. Conversion Claim (Claim 6)**

4 ARIN contends that conversion is triggered by the act of wrongfully taking property, that
5 ARIN's alleged withholding of Kremen's IP Resources occurred in 2001, and that the three-year
6 statute of limitations for conversion has expired. (Reply Memorandum of American Registry for
7 Internet Numbers, Ltd. in Support of Motion to Dismiss or, Alternatively, for Stay at 4-7, hereafter,
8 "Reply," Docket Item No. 31.) Plaintiff contends that ARIN's withholding of the IP Resources is a
9 continuing tort not barred by the statute of limitations, citing the 1960 Supreme Court case of de
10 Vries v. Brumbach, 349 P.2d 532 (Cal. 1960). (Opposition at 4-5.)

11 Under California law, a three-year statute of limitations applies to conversion claims. Cal.
12 Civ. Proc. Code § 338(c). The statute of limitations begins to run at the time of the wrongful taking
13 or illegal exercise of dominion over property. Reed v. Molony, 38 Cal. App. 2d 405, 411 (1940).
14 The cause of action arises on the date of injury, or the occurrence of the last element essential to the
15 cause of action. Id. These fundamental rules have been modified by the "discovery rule," which
16 provides that the statute of limitations does not begin to run until a plaintiff knew or should have
17 known of the defendant's wrongful conduct. Naftzger v. Am. Numismatic Soc., 42 Cal. App. 4th
18 421, 428 (1996).

19 In de Vries, the California Supreme Court held that conversion is "a continuing tort—as long
20 as the person entitled to the use and possession of his property is deprived thereof..." 349 P.2d at
21 535. However, this holding was within a completely unrelated context of a conspiracy to rob a San
22 Francisco jewelry firm. The de Vries court's focus was on rebutting the robber-appellant's claim that
23 because he was not a member of the pre-robbery conspiracy, he was not liable for the initial
24 conversion that took place at the time of the robbery. Id. at 534. The de Vries court did not address
25 statute of limitations issues. Rather, it focused on the separate question of whether a defendant
26
27
28

1 could be held civilly liable as a joint tortfeasor for his involvement in a continuing conspiracy to
2 convert. (Reply at 6.) The Court declines to extend the holding of de Vries to this unrelated case.

3 The Court finds that the statute of limitations was triggered by ARIN's refusal to transfer the
4 contested IP Resources to Plaintiff in November 2001. This refusal put Plaintiff on notice of ARIN's
5 alleged wrongful conduct. To hold otherwise would toll the statute indefinitely and eviscerate the
6 need for Plaintiff to timely file his action, despite his long-existing knowledge of the injury. Based
7 on the three-year statute of limitations, Plaintiff's conversion claim (Claim 6) is time-barred as of
8 November 2004.

9 **D. Breach of Fiduciary Duty (Claim 7)**

10 Plaintiff contends that he has alleged violations well within the statutory period, specifically
11 that ARIN breached its fiduciary duties to him "on a continual basis" through 2005. (Opposition at
12 5-6.) ARIN contends that it is not Plaintiff's fiduciary, and that Plaintiff's theory is unviable because
13 it "would suspend or otherwise postpone the statute of limitations in perpetuity so long as ARIN
14 maintains a fiduciary relationship with [Plaintiff] (which in [Plaintiff's] view would be forever.)"
15 (Reply at 6-7.)

16 State law claims for breach of fiduciary duty are subject to California's "catch-all" four-year
17 statute of limitations. Cal. Civ. Proc. Code § 343; see also Robuck v. Dean Witter & Co., 649 F.2d
18 641, 644 (9th Cir. 1980). Plaintiff has alleged that ARIN breached its fiduciary duty to him when it
19 refused to transfer the IP Resources referenced in the Court's September 2001 Order to him, by its
20 alleged conversion of his property, and by "misappropriation" of property belonging to Plaintiff.
21 (Compl. ¶¶ 135, 136, 140.) As explained above, ARIN's alleged conversion of Plaintiff's property
22 does not constitute a continuing violation for statute of limitations purposes. Accordingly, the Court
23 finds that Plaintiff has alleged at most a single breach of fiduciary duty, which occurred in
24 November 2001. Plaintiff's breach of fiduciary duty is time-barred because he did not initiate his
25 lawsuit until 2006.

1 **E. Unfair Competition Claim, Cal. Bus. & Prof. Code § 17200 (Claim 8)**

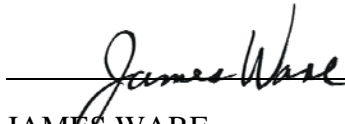
2 ARIN contends that the statutory period for a Section 17200 unfair competition claim begins
3 when the defendant's conduct occurs—here, in November 2001. (Reply at 5, 7.) Plaintiff contends
4 that "the acts alleged, and the harm that arose from the acts, occurred over a period of years, and in a
5 continual manner, and thus the allegations are clearly within the four year statute of limitations for
6 California statutory unfair competition." (Opposition at 6.)

7 Section 17200 unfair competition claims are subject to a four-year statute of limitations. Cal.
8 Bus. & Prof. Code § 17208. Here, Plaintiff has alleged that ARIN committed acts of unfair
9 competition in violation of the Sherman Act, Cartwright Act, conversion, and breach of fiduciary
10 duty. (Compl. ¶ 143.) As discussed *supra*, each of these unfair competition claims arose
11 simultaneously in November 2001; they do not reference multiple, continuous acts that would restart
12 the statute of limitations. Accordingly, Plaintiff's state-law unfair competition claim has been time-
13 barred since November 2005.

14 **V. CONCLUSION**

15 The Court GRANTS Defendant's Motion to Dismiss with prejudice.

16
17 Dated: December 20, 2006

18 
19 JAMES WARE
20 United States District Judge
21
22
23
24
25
26
27
28

1 **THIS IS TO CERTIFY THAT COPIES OF THIS ORDER HAVE BEEN DELIVERED TO:**

2 Christopher L. Wanger cwanger@manatt.com

3 Jack S. Yeh jyeh@manatt.com

4 Karl Stephen Kronenberger karl@kronenbergerlaw.com

5 Terri R Hanley email@terrihanley.com

6 **Dated: December 20, 2006**

Richard W. Wieking, Clerk

7 **By: /s/ JW Chambers**

Elizabeth Garcia

Courtroom Deputy